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BY ELECTRONIC DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington D.C. 20554

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 MB Docket No. 05-311

Dear Ms. Dortch:

The State of Hawaii ("Hawaii"),[1] by and through its attorneys, hereby expresses its concern regarding the use of a wholly fictional legal concept in the draft order in the above captioned proceeding[2] in an effort to justify divergent treatment between different regulatory assessments that Congress authorized franchising authorities to include in cable franchise agreements to benefit the public. Specifically, the *Draft Order* manufacturers a category of regulatory obligations identified as "an essential part of the provision of cable service to subscribers" in an effort to distinguish in-kind support for public, educational and government access ("PEG") channels and institutional networks ("I-Nets"), which the Commission seeks to include within the definition of franchise fees, and build out obligations and customer service requirements, which the Commission seeks to exclude from the definition of franchise fees.[3]

In an effort to justify this unwarranted distinction, the *Draft Order* claims that build out obligations are "an essential part of the provision of cable service to subscribers" in that "while they are necessarily 'cable-related,' these types of obligations are not a 'tax, fee, or assessment';

[1] This letter is being submitted on behalf of the State of Hawaii through its Department of Commerce and Consumer Affairs, which is the cable franchise authority for the State.

[2] *See* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, *Third Report and Order*, FCC-CIRC1908-08 (July 11, 2019) ("*Draft Order*").

[3] *Id.*, ¶ 57.

they are simply part of the provision of cable service under a franchise."[4] This characterization of build out requirements is not only entirely unsupported by the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Communications Act"), but it is also in direct conflict with the prior conclusions of the judiciary and the Commission regarding the appropriate scope of build out obligations in franchise agreements.

Section 621(a)(4)(A) of the Communications Act includes the most direct statement regarding the regulatory reach of build out obligations in franchise agreements, instructing that franchising authorities "shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area."[5] The U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") rejected the possibility that this provision could support a finding that build out requirements are an essential component of cable television service, explaining that Section 621(a)(4)(A) does not require that cable operators extend service "throughout the franchise area," but is instead a limit on the ability of franchising authorities to impose such requirements.[6] The Sixth Circuit subsequently reached the same conclusion, affirming that Section 621(a)(4)(A) "is more aptly designated as a limitation on the authority of LFAs, rather than an affirmative bestowal of rights."[7]

Section 621(a)(3) of the Communications Act also indirectly addresses build out obligations, instructing that "[i]n awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[8] Far from elevating build out requirements to the status of "essential," the D.C. Circuit concluded that this provision "on its face prohibits discrimination on the basis of income; it manifestly does not require universal service" in the build out of cable systems within a franchise area.[9] Thus, "if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited."[10]

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[4] *Id.*

[5] 47 U.S.C. § 541(a)(4)(A).

[6] *Americable Intern., Inc. v. Dep't of Navy*, 129 F.3d 1271, 1274-75 (D.C. Cir. 1997).

[7] *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[8] 47 U.S.C. § 541(a)(3).

[9] *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988).

[10] *Id.*

These constraints on the role of build out requirements are echoed in the Commission's conclusions on this issue. For example, the Commission found that, with respect to non-incumbent cable operators, "[n]othing in the Communications Act requires competitive franchise applicants to agree to build-out their networks in any particular fashion."[11] Further, with respect to all cable operators, the Communications Act "does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area."[12]

This limited treatment of build out measures does not comport with the *Draft Order's* claim that build out requirements are an "essential part of the provision of cable service to subscribers." Like PEG and I-Net contributions, build out obligations are assessments that franchising authorities are expressly permitted to impose in a reasonable manner on a cable franchisee. Further, the Communications Act permits franchising authorities to impose PEG and I-Net requirements uniformly on both incumbents and new entrant cable franchisees. In contrast, the Commission has concluded that build out requirements may be unreasonable when imposed on new entrants[13] and cannot be used to require incumbents to serve every household absent redlining.[14]

The Commission should therefore abandon its effort to distinguish these various types of in-kind regulatory assessments by claiming that some of them are essential and others are not. Instead, the only reasonable manner in which to interpret the Section 622(g)(1) definition of franchise fees is to conclude that, although franchise fees can include certain types of nonmonetary assessments, Congress did not intend for franchise fees to include cable-related in-kind regulatory assessments, such as PEG and I-Net contributions or build out requirements. Further, although Section 622(g)(2) identifies five specific exceptions to the definition of franchise fees, all of them involve the making of payments by cable operators, not the provision of in-kind services. The most reasonable interpretation of this omission is that Congress did not intend for cable-related in-kind contributions to be included within the definition of franchise fees or, at the very least, Congress failed to anticipate that its definition of franchise fees might later be interpreted to included cable-related in-kind contributions and, therefore, it did not see a need to expressly exclude them from the definition of franchise fees in the Communications Act. In either event,

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[11] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 06-180, ¶ 83 (March 5, 2007).

[12] Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, *Report and Order*, MM Docket No. 84-1296, ¶ 82 (1985).

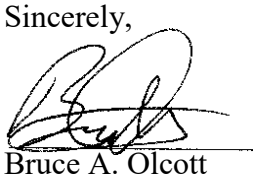
[13] *See supra note* 11.

[14] *See supra note* 12.

the Commission should adhere to the most reasonable interpretation of the Communications Act and Congressional intent by refraining from treating in-kind support for PEG programming and I-Nets as subject to the five percent limit on franchise fees.

Please contact the undersigned if you have any questions about this matter.

Sincerely,



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